LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 16 1966
JOHN F. DAVIS, CLERK

No. 1213

In the
Supreme Court of the United States
October Term, 1965.

FRANK HORTON & COMPANY, INC.,
Respondent.

vs.

COOK ELECTRIC COMPANY,
Petitioner.

REPLY BRIEF TO ANSWERING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Thomas J. Johnson, Jr.
Albert F. Manion
105 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 1213

FRANK HORTON & COMPANY, INC.,

Respondent.

vs.

COOK ELECTRIC COMPANY,

Petitioner.

REPLY BRIEF TO ANSWERING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The question presented by this Petition is whether a document which is not admissible in evidence under any established or recognized rule, may be accepted by the trial court merely because the trial court feels it expedient to dispense with the direct examination of the witness. The real issue presented by this Petition is whether fundamental rules of evidence may be waived by a trial judge over the objection of the opposing party.

The Appendix references of Respondent's Brief in Opposition show that on direct examination Frank Horton was unable to testify as to the manner, method or rate of performance which he had contemplated in estimating the anticipated cost of performance in his bid to defendant (A. 159-164). Defendant's cross examination of Mr. Hor-

ton, on the other hand, demonstrated that the exhibits which plaintiff offered in lieu of Mr. Horton's direct testimony had not been prepared until sometime after January, 1963. Mr. Horton was forced to admit that the calculations in these exhibits had been made independently of any original or contemporaneous records and after Mr. Horton's independent memory of his intended methods and manner of performance had already failed (A. 205-210).

Plaintiff's burden of proof required it to prove, by direct evidence, the manner, method and rate at which it would have executed the work at the time and places of performance as specified in defendant's prime contract with the Air Force. Mr. Horton's revised calculations — made shortly before trial to overcome the failure of his originally submitted calculations of manner, method and rate of performance, the failure of which was demonstrated by the defendant in a final settlement conference — were irrelevant, being obviously based upon hindsight and hypothetical factors assumed substantially after the fact. Expert testimony as to anticipated profits was incompetent, irrelevant and immaterial because no proper foundation of facts was introduced into evidence upon which such "expert" testimony could be based, was ever laid.

The citation of 5 Wigmore, *Evidence* (3rd Ed. 1940) §1385a relates to those cases wherein the report of an independent expert has been prepared on the basis of other independent evidence from fundamental facts which may be tested and examined by the opposing party, independently of the report itself. In the present case, Mr. Horton's calculation is but a self-serving attempt to rationalize plaintiff's claim for loss of anticipated profits, based entirely upon subjective hypotheses, admittedly first assumed at the time the calculation was prepared.

The superficiality of the Opinion filed by the Court of Appeals in this case is best demonstrated by the Opinion itself. The unfairness of the Opinion becomes apparent when the issues which the head-noter assumed in the preparation of the official report, are compared with the issues which were actually presented to the Court of Appeals for review.

Unfortunately the Transcript of Record submitted to this Court by the Clerk of that Court does not contain a copy of Petitioner's original Brief nor a copy of the Petition for Rehearing. However, the Appendix does contain Petitioner's Post Trial Motions (A. 55-62) and the Opinion of the trial court denying such motions (A. 80-83), and a comparison of these demonstrates the failure of the trial court to directly consider or pass upon the issues raised by such motions. In answer to the same points raised on appeal the Opinion of the Court of Appeals closely follows the Opinion of the trial court.

Respectfully submitted,

THOMAS J. JOHNSON, JR.
ALBERT F. MANION
Attorneys for Petitioner